

It is true that s 31c makes no mention of consolidation of shares or fractional shares when the capital of a company is reduced but the consolidation that is sought by Bank Negara is consequential upon the respondent's capital being reduced and as such, it is only one of the modes of restructuring which Bank Negara considers to be beneficial to the depositors. It is not introducing anything new into s 31c but is part and parcel of the machinery consequential upon a reduction of capital.

On the facts of this case, I had considered that public interest, particularly as it affects well over 90,000 depositors in the respondent company, far outweighs the interest of one single shareholder, the petitioner in this winding up petition. Bearing in mind the financial standing of the respondent company, this in itself provides a good reason that the hearing of the restructuring petition proceeded without any undue delay and on that conclusion, I had allowed Bank Negara's motion to have that part of the order dated 3 April 1989 varied so as to allow the bank's petition to be heard before the winding-up petition.

In making this order, I had also dismissed the petitioner's oral application for a stay as no special circumstances were put forward and a stay would defeat the very purpose why I had allowed the order of court dated 3 April 1989 varied.

*Motion allowed.*

Solicitors: *Shook Lin & Bok; Murthi & Partners.*

Reported by *Kevin Mathews*

## A **Mark Jaya Engineering Sdn Bhd v LFY Construction Sdn Bhd**

HIGH COURT (JOHORE BAHRU) — COMPANIES WINDING UP NO 42-134 OF 1988  
ABU MANSOR J  
14 OCTOBER 1989

- B *Companies and Corporations — Winding up — Whether respondent company was insolvent — Existence of supporting creditors — Whether relevant — Whether petitioner was a creditor of the respondent company — Whether the precondition that petitioner be a creditor should be first satisfied before question that company is insolvent can be considered — Companies Act 1965, ss 217, 218(a), (b) & (c)*

The petitioner applied that the respondent be wound up by a petition dated 30 September 1988. The petitioner says the respondent company is indebted to the petitioner for the sum of \$54,115.75 together with interest at 8% pa from 6 May 1985 to the date of realization. On 8 September 1988, the respondent company was served a copy of the statutory notice dated 6 September 1988 at the respondent's registered office. The respondent was required to pay the said sum within 21 days but no payment was received. The petitioner says that the respondent company was therefore unable to pay its debts and asked the court for the orders sought for.

- E The respondent company opposed the petition. On 7 December 1988, the respondent applied to strike out the petition unsuccessfully because the respondent's application to have the in default judgment in the Kuala Lumpur High Court ('KL judgment') set aside had not been heard. The respondent was ordered to pursue the application in Johore Bahru only after the KL judgment had been set aside. On 23 February 1989, the KL judgment was set aside. The respondent company also had a counterclaim against the petitioner in the Kuala Lumpur suit for the sum of S\$123,703.20 and it was pending in the High Court.

**Held**, dismissing the petition:

- G (1) Applying *Re Lympne Investments Ltd*,<sup>6</sup> when a debt was disputed on substantial ground, the petitioner was not a 'creditor' clothed with locus standi to present a petition even if the company is insolvent.

- H (2) The petitioner's oral application to substitute the first judgment creditor was refused because it was unjust to do so. By granting that application, the first judgment creditor would be able to short circuit the whole of the procedures incumbent on a petitioner to adhere to and comply before a winding-up order could be made and had. The procedure culminating in the ending of that corporate person must have been designed to achieve an orderly mode of winding up with sufficient checks and balances. Any short cuts would only work in injustice.

### Cases referred to

- I 1 *Teck Yow Brothers Hand-Bag Trading Co v Maharani Supermarket Sdn Bhd* [1989] 1 MLJ 101 (refd)  
2 *National Mutual Life Association of A/Asia Ltd v Oasis Developments Pty Ltd & Ors* (1982) 7 ACLR 758 (refd)  
3 *Mann & Anor v Goldstein & Anor* [1968] 2 All ER 769 (refd)  
4 *Jurupakat Sdn Bhd v Kumpulan Good Earth (1973) Sdn Bhd* [1988] 3 MLJ 49 (folld)  
5 *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197 (distd)  
6 *Re Lympne Investments Ltd* [1972] 2 All ER 385 (folld)

**Legislation referred to**

Companies Act 1965 ss 217, 218(a), (b), (c)  
Companies (Winding-Up) Rules r 33

*Ong Ban Chai* for the petitioner.  
*Andrew Ng* for the respondent.

*Cur Adv Vult*

**Abu Mansor J:** By their petition dated 30 September 1988, the petitioner applied that the respondent be wound up, that a liquidator be appointed and that the petitioner and the supporting creditors be allowed costs. The respondent company opposes the petition. I heard argument after which I reserved judgment. My judgment is as follows.

The respondent company, LFY Construction Sdn Bhd, was incorporated as a limited company on 23 November 1972 under the Companies Act 1965 with an authorized capital of \$3,000,000 divided into 3,000,000 shares of \$1. The paid-up capital was \$1,000,000.

The petitioner says the respondent company is indebted to the petitioner for the sum of \$54,115.75 together with interest at 8% pa from 6 May 1985 to the date of realization. On 8 September 1988, the petitioner's solicitors, Ong Ban Chai & Co, served on the respondent company a copy of the statutory notice dated 6 September 1988 under s 218 of the Companies Act 1965 at the respondent's registered office. The respondent is required to pay the said sum within 21 days but no payment was received. The petitioner says that the company was therefore unable to pay its debts. The petitioner therefore asked the court for the orders sought for.

Mr Ong Ban Chai for the petitioner in open court, in applying the orders prayed for, also handed in a list of supporting creditors (P1) whose total claim amounts to \$2.3m. Of the supporting creditors, four at p 2 of P1 and two at p 3, are also judgment creditors. The rest are creditors who have yet to obtain judgments.

Mr Ong Ban Chai further submitted that apart from the petitioner and the supporting creditors, the respondent was also suffering from execution pursuant to a judgment obtained by Wake Sdn Bhd for the sum of \$160,645.02 and execution was unsatisfied. He submitted that with all these, any dispute on the petitioner's debt has become irrelevant because the respondent is presumed insolvent under s 218(2)(b) or (c) of the Companies Act 1965. He says since the intended execution was void under s 224 of the Companies Act 1965, the petitioner applied for and was granted a provisional receiver under s 231 of the Act.

For the proposition that the respondent was insolvent, the petitioner relied on *Teck Yow Brothers Hand-Bag Trading Co v Maharani Supermarket Sdn Bhd*<sup>1</sup> which held that a company may be wound up when the evidence is overwhelming that a company is unable to pay its debts.

A He also cited *National Mutual Life Association of A/Asia Ltd v Oasis Developments Pty Ltd & Ors*<sup>2</sup> where it was held that a petition relying on that 'the company was unable to pay its debts' may rely on the fact that the debtors had persistently failed to pay its due debts after demands in that regard. In this case, Mr Ong Ban Chai says the petitioner therefore prays that on the facts, the court should wind up the respondent.

B Mr Ng, however, opposed the petition. He says that only a creditor under s 217 of the Companies Act 1965 can present the petition. The respondent's counsel recounted that on 7 December 1988, the respondent applied to strike out this present petition. The respondent was unsuccessful because the respondent's application to have the in default judgment in the Kuala Lumpur High Court in CS 24-3723/86 ('KL judgment') set aside had not at that time been heard. The respondent was ordered to only pursue the application in Johore Bahru after the KL judgment had been set aside if that could be obtained. Now the position is that the KL judgment had been set aside on 23 February 1989. The respondent company also has a counterclaim against the petitioner in the Kuala Lumpur suit for the sum of \$123,703.20 and it is pending in the High Court. Counsel submitted that since the basis of the petitioner applying for a winding up, ie the KL judgment, had been extinguished, the petitioner is no longer a 'creditor' of the company and he no longer has locus standi to proceed with the petition. Counsel cited *Mann & Anor v Goldstein & Anor*<sup>3</sup> which held that as the existence of a debt on which each winding up was founded was disputed on grounds showing substantial defence requiring investigation, the petitioner has not established that he was a creditor and he had no locus standi to present the petition. Counsel says that it was a precondition that the petitioner be a creditor and this criteria be first satisfied before the second question that the company is insolvent can be considered.

G Counsel for the respondent cited *Jurupakat Sdn Bhd v Kumpulan Good Earth (1973) Sdn Bhd*<sup>4</sup> where it was held that in the absence of a judgment debt the petitioner is not a 'creditor' and had no locus standi. Hence, the application to have the petition struck out was allowed. Similarly in this present case, since the default judgment in the Kuala Lumpur case had been set aside, there was therefore, he submitted, no basis for the petition to wind up and he duly applied for the dismissal of the petition.

H In reply, Mr Ong Ban Chai argued that the authorities on locus standi only hold good if there are no supporting creditors. He urged the court to distinguish the cited case with the facts before the court. In our present petition, there are supporting creditors and six of them are judgment creditors. No doubt under s 217 of the Companies Act 1965 a petition must be presented by a creditor but he submits a 'creditor' includes a contingent creditor.

He says this must be so since, in considering whether a company should be wound up under s 218(a), (b) or (c) of the Companies Act 1965, the court may take into account not only present but contingent debts in coming to a finding that the company is unable to pay its debts.

Alternatively, if the court so finds that the present petitioner has no locus standi, then since he is also representing the supporting creditors, counsel applied, on behalf of the supporting creditors, that under r 33 of the Companies (Winding-Up) Rules 1972, the court substitutes the first judgment creditor, the Anglo American Corp Sdn Bhd, as petitioner. He therefore applied for such substitution.

As was submitted by counsel for the respondent, he was taken by surprise in the matter of the last submission. The court agreed the point was an afterthought by counsel for the petitioner. Be that as it may, I think the point deserves consideration. I therefore allowed the petitioner's counsel to expand on it. As he said, in the authorities cited by counsel for the respondent, there were no supporting creditors and therefore no question of r 33 applying. He cited *Re Welsh Brick Industries Ltd*<sup>5</sup> where it was held that in spite of the fact that unconditional leave to defend had been granted in the King's Bench action, it was competent for the judge in the winding-up court to go into the evidence which was before him to consider whether or not there was a bona fide dispute. The registrar's order was a matter which the winding-up court would take into consideration, but it did not preclude the judge from finding, as a fact, that there was no bona fide dispute as to the debt. In further support of his application that the first judgment debtor be substituted, the petitioner's counsel urged the court to peruse s 221 of the Companies Act 1965 and applied that the court may make an order which is just.

I find the petitioner's application to substitute the first judgment creditor in place of the petitioner caused me some difficulty. The difficulty arises because *Re Welsh Brick Industries Ltd*<sup>6</sup> is far from the authority to have the petitioner substituted. What that authority says is that in spite of the dispute, it did not preclude the judge from finding that there was no bona fide dispute. It means if a winding up is to be made, it is still incumbent on the court to consider the Kuala Lumpur dispute to see whether it is bona fide. In this case, it had to be taken that there was substantial dispute else the Kuala Lumpur court would not, by order, have allowed the respondent's application to have the default judgment set aside. But there are other judgment creditors not satisfied, indicating to a certain degree that the respondent may be unable to pay its debts and is therefore insolvent. I lean in favour of *Re Lympe Investments Ltd*<sup>6</sup> at p 389 which decided that when a debt was disputed on substantial ground, the petitioner was not a 'creditor' clothed with locus standi to present a petition even if the company was insolvent (emphasis is

mine). Consistent with the principle in that case, *Jurupakat Sdn Bhd v Kumpulan Good Earth (1973) Sdn Bhd*<sup>4</sup> was also decided echoing that decision.

I also refuse the petitioner's counsel's application to substitute the first judgment creditor because considered on any angle one arrives at the answer it is unjust to do so. 'Just' should not only be for the petitioner and the supporting creditors but there is a higher consideration that by granting that application, the first judgment creditor would be able thereby to short circuit the whole of the procedures incumbent on a petitioner to adhere to and comply with before a winding-up order could be made and had. The procedure culminating in the ending of that corporate person must have been designed to achieve an orderly mode of winding up with sufficient checks and balances. I rule any short cuts would only work in injustice. For the reasons stated above, I therefore allow the objection of the respondent and dismiss the petition for winding up with costs to the respondent to be taxed.

*Application allowed.*

Solicitors: Yeo & Yeo; Ong Ban Chai & Co.

Reported by Kevin Mathews

### **Ming Yueh Holdings Sdn Bhd v Kong Ming Bank Bhd & Anor**

F HIGH COURT (SIBU) — SUIT NO KG 17 OF 1989  
HAIDAR J  
2 SEPTEMBER 1989

*Civil Procedure — Injunction — Setting aside — Application for — Legal status of applicant to obtain injunction — Whether member of company*

G *Companies and Corporations — Registered member — Member and shareholder distinguished — Companies Act 1965, ss 16(6), 143, 148(1), 158(1) & Fourth Schedule Table A art 111*

H The plaintiff was a registered shareholder of the first defendant company. Its shares were allegedly sold to two parties who commenced legal proceedings for a declaration that they were the registered and beneficial owners of the shares and obtained injunction orders restraining the plaintiff from dealing with or transferring the same. For the purpose of making a rights issue, the parties mutually agreed to transfer the shares to the second defendant as stakeholder and to allow the first defendant to register the second defendant as the shareholder of the shares and rights issue. In view of this, the injunction orders were discharged and pursuant to negotiations between the parties for a settlement, the second defendant was appointed stakeholder. I Upon the failure of the negotiations, the plaintiff obtained an ex parte injunction restraining the first defendant from proceeding with its annual general meeting ('AGM') on 10 May 1989 or any other date or holding any other general meeting unless the plaintiff had been given notice of the same and were permitted to attend and vote. The plaintiff contended, inter alia, that if the AGM was to proceed, the plaintiff would be wrongfully de-